Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Sophie Perron-Martin,

complainant,

and

Symcor Inc.,

respondent.

Board File: 30215-C
Neutral Citation: 2014 CIRB **719**
April 2, 2014

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 156(1) of the *Canada Labour Code (Part II–Occupational Health and Safety)* (the *Code*).

Parties' Representatives of Record

Ms. Sophie Perron-Martin, on her own behalf;
Ms. Fany O'Bomsawin, for Symcor Inc.

I. Introduction

[1] Section 16.1 of the *Code* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine the complaint without an oral hearing.

[2] On November 8, 2013, Ms. Sophie Perron-Martin filed a complaint pursuant to section 133(1) of the *Code*, in which she alleged that her former employer, Symcor Inc. (Symcor), had dismissed her in contravention of section 147 of the *Code*.

[3] In its response, Symcor raised a preliminary objection regarding the timeliness of the complaint, alleging that Ms. Perron-Martin had failed to comply with the 90-day time limit for filing a complaint set out in section 133(2) of the *Code*. In relation to the merits of the complaint, Symcor denied that Ms. Perron-Martin's dismissal had anything to do with the exercise of a right under Part II of the *Code*.

[4] The Board has decided to dismiss Ms. Perron-Martin's complaint. The Board does not sit in appeal of decisions made by employers pursuant to their internal policies respecting harassment and discrimination.

II. Chronology of Key Events

[5] In their pleadings, the parties describe the harassment complaints involving Ms. Perron-Martin at Symcor. Those complaints were made in the years 2011 through 2013.

[6] Ms. Perron-Martin filed some of the harassment complaints herself, and others were filed against her.

[7] Symcor investigated the complaints in accordance with its "anti-harassment and anti-discrimination" policy (translation) (anti-harassment policy). Reference was also made to its "guaranteed fair treatment" (translation) policy.

[8] Ms. Perron-Martin filed a harassment complaint in October 2011. She described that complaint in her pleadings received on November 8, 2013, as follows:

> In October 2011, I made a complaint to my then manager concerning an employee's attitude toward me **because I felt harassed** and treated inappropriately by her. The complaint was not dealt with and the employee in question continued to hassle me in a variety of ways.
>
> (translation; emphasis added)

[9] Ms. Perron-Martin filed a second complaint in May 2012, as described in her pleadings:

> In May 2012, **I filed a harassment complaint with my manager.** Given that nothing was being done, on June 25, 2012, I filed the complaint with Human Resources in Montréal. Meetings and other discussions followed internally. **It was determined that there was no evidence of any harassment against me.** I followed all the steps set out in Symcor's fair treatment policy and made the same complaint to management in Montréal, Human Resources in Toronto and management in Toronto.
>
> (translation; emphasis added)

[10] In June 2013, two employees filed complaints against Ms. Perron-Martin. As described in Ms. Perron-Martin's pleadings, those complaints led to her dismissal on July 17, 2013:

> Toward mid-June, Julie Griffin called me to her office to advise me that two employees had filed complaints against me. She then gave me the document listing the allegations. **In my opinion, those complaints were nothing more than a set-up, a way of getting back at me for having complained about the harassment to which I was being subjected. All of the different levels to which I filed my complaint dismissed the fact that I was being harassed.**
>
> Following the filing of those complaints against me, an outside investigator met with me to discuss the situation. I gave her my complete account of the facts, and she provided me with a copy of my statement, dated June 26, 2013. I gave the investigator frank explanations and there was nothing to incriminate me. Following the submission of the written record of my statement, Julie Griffin drafted a summary that supported the allegations against me. I received a copy of that summary by mail following my dismissal on July 17.
>
> (translation; emphasis added)

[11] Ms. Perron-Martin subsequently filed a complaint with Quebec's Commission des normes du travail (the Commission) in which she alleged dismissal without just and sufficient cause. In a letter dated August 23, 2013, the Commission informed her that it lacked jurisdiction to entertain her complaint given that Symcor was a federally regulated company.

[12] The Board understands from Ms. Perron-Martin's pleadings that she then filed an unjust dismissal complaint against Symcor under Part III (Labour Standards) of the *Code*.

[13] Ms. Perron-Martin submits that she learned about the existence of the Board on September 30, 2013, from the investigator responsible for handling her unjust dismissal complaint:

> I didn't know that the Canada Industrial Relations Board existed until I was told about it at a meeting with the CLC investigator on September 30, 2013. The investigator recommended that I also file a complaint with your organization given that, in his view, several sections of the *Canada Labour Code* had been violated in the process leading to my dismissal. Among other things, the complaints filed against me just before my dismissal were investigated by outside firms while the investigations related to my complaint were handled internally by Symcor.
>
> (translation)

[14] The Board received Ms. Perron-Martin's complaint on November 8, 2013.

III. Questions

[15] This complaint raises two questions:

A. Is the complaint timely, given the 90-day time limit set out in section 133(2) of the *Code*?

B. Has Ms. Perron-Martin demonstrated that Symcor violated section 147 of the *Code*?

IV. Analysis and Decision

A. Is the complaint timely, given the 90-day time limit set out in section 133(2) of the *Code*?

[16] Symcor alleges that Ms. Perron-Martin's complaint was filed outside the prescribed time limit.

[17] The Board accepts Symcor's opening position that Ms. Perron-Martin's complaint was filed more than 90 days after the date of her dismissal. Symcor dismissed Ms. Perron-Martin on July 17, 2013. The Board did not receive her complaint until November 8, 2013, 114 days after the dismissal.

[18] On the face of it, the complaint filed by Ms. Perron-Martin 114 days after her dismissal does not comply with section 133(2) of the *Code*:

> 133.(2) The complaint shall be made to the Board **not later than ninety days** after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.
>
> (emphasis added)

[19] On page 2 of her reply, Ms. Perron-Martin described her efforts to challenge her dismissal:

> **Following my dismissal, I did some research with a view to filing a complaint of unjust dismissal and dismissal without cause.** I consulted a lawyer and it was that lawyer that suggested that I file a complaint with the Canada Labour Congress. All of these steps, consultations and appointments took a lot of time. **During one meeting with a CLC investigator, I was given further information that made me realize that I might be able to file a complaint with the CIRB, as my case might fall under your jurisdiction.**
>
> (translation; emphasis added)

[20] Section 156 of the *Code* incorporates some of the Board's powers under Part I of the *Code*:

> 156. (1) Despite subsection 14(1), the Chairperson or a Vice-Chairperson of the Board, or a member of the Board appointed under paragraph 9(2)(*e*), may dispose of any complaint made to the Board under this Part and, in relation to any complaint so made, that person
>
> > (*a*) **has all the powers, rights and privileges that are conferred on the Board by this Act other than the power to make regulations under section 15; and**
> >
> > (*b*) is subject to all the obligations and limitations that are imposed on the Board by this Act.
>
> (2) **The provisions of Part I respecting orders and decisions of and proceedings before the Board under that Part apply in respect of all orders and decisions of and proceedings before the Board or any member thereof under this Part.**
>
> (emphasis added)

[21] Among the Board's powers under Part I, section 16(*m.1*) makes provision for the following:

> 16. The Board has, in relation to any proceeding before it, power
>
> ...
>
> > (*m.1*) to extend the time limits set out in this Part for instituting a proceeding.

[22] The question under the circumstances is whether the Board should exercise its discretion to "extend the time limits…for instituting a proceeding."

[23] As described in *Kerr*, 2012 CIRB 631 (*Kerr 631*), the Board does not routinely extend the established time limits:

> [21] The Legislator has clearly instructed the Board that labour relations complaints, including those from laypersons, but also from trade unions and employers, must be filed within relatively strict time limits. Indeed, prior to the 1999 amendments made to the *Code*, which included the addition of

section 16(*m.1*), the Board had no discretion whatsoever to extend the time limits for instituting proceedings: *Upper Lakes Shipping Ltd.* v. *Sheehan et al.*, [1979] 1 S.C.R. 902.

[22] The need for a time limit in labour relations matters is not surprising. The Legislator frequently imposes time limits for various legal procedures. Given the adage that "labour relations delayed is labour relations denied," the Legislator, while granting the Board a new discretion in 1999, still maintained the *Code*'s 90-day time limit for filing various labour relations complaints.

[23] The Board takes seriously the need to deal with labour relations complaints in a timely manner. The Board recently commented, in *Torres*, 2010 CIRB 526 (*Torres 526*), how it will examine cases which request an extension of time limits. In *Torres 526*, the complainants filed their complaint six months after the deadline:

> [19] The Board will not automatically relieve a party from compliance with the 90-day time limit for the filing of an unfair labour practice complaint. The Legislator has always emphasized that labour relations matters must be brought to the Board forthwith. Potential respondents are entitled to know whether they need to preserve evidence and otherwise prepare for a complaint under the *Code*.
>
> [20] While it may appear unfair that laypeople need to act quickly in bringing labour relations complaints forward, section 97(2) applies equally to trade unions and employers.
>
> [21] The Board will not exercise its discretion under section 16(*m.1*) so as to render illusory the Legislator's intent to oblige parties to file their labour relations complaints expeditiously.
>
> [22] Nonetheless, the Board will consider extending the time limits in compelling situations, such as if a complainant's health prevented the filing of a timely complaint: *Galarneau*, 2003 CIRB 239. Generally, the Board will consider the length of the delay and the justification for it.

[24] The Federal Court of Appeal, in *Eduardo Buenaventura Jr. et al.* v. *Telecommunications Workers Union (TWU) et al.*, 2012 FCA 69, affirmed the Board's decision not to extend the time limit in *Torres 526*:

> [44] The Board also considered specifically the length of the delay (9 months), and its cause. The Board concluded that the main cause was the honest but mistaken belief of the complainants that the Board would prefer a single, multi-party complaint filed late to a multitude of individual complaints filed earlier. However, the Board noted that it has ample procedural means for dealing with large numbers of complaints.
>
> [45] The complainants do not suggest that the Board misunderstood the reason for the delay. However, they argue that it was unreasonable for the Board not to give special consideration to the fact that the complainants were not represented for most of those 9 months. They point out that their relative inexperience represented difficult hurdles, both in assembling the information they believed would be necessary to support their complaint, and in appreciating the Board's procedures and the ways in which a multiplicity of complaints could best be managed.
>
> [46] A decision is reasonable if it is sufficiently explained and it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, at paragraph 47. In my

> view, the record discloses nothing unreasonable about the Board's decision not to extend the time limit in this case.
>
> [47] It is true that the Board took an unsympathetic stance toward the difficulties faced by the complainants as they attempted to navigate unfamiliar territory and to ensure that their complaint, once made, could be handled efficiently. However, these difficult circumstances gave the complainants no legal right to have the Board exercise its discretion in their favour. In my view, the Board's decision to refuse the extension was a decision that fell within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law, and thus was reasonable. In my view, the application for judicial review should be dismissed.

> [25] As mentioned in *Torres 526*, besides the fact the *Code* contains a time limit for filing a complaint, opposing parties should be able to know whether they have to preserve their evidence and prepare for a possible labour relations proceeding. Once the 90-day time limit has passed, they should be able to assume that the matter has ended.

[24] Notwithstanding the general principle described in *Kerr 631*, *supra*, the Board finds that Ms. Perron-Martin's complaint constitutes an exceptional case which warrants an extension of the 90-day limit. A number of factors support this conclusion.

[25] First of all, Ms. Perron-Martin acted diligently following her dismissal. She filed several complaints at the provincial and federal levels. This is not a case where a complainant did nothing for 90 days. Ms. Perron-Martin always wanted to contest her dismissal.

[26] Secondly, constitutional law is complicated; the Supreme Court of Canada is not always unanimous in its constitutional law decisions. The fact that a diligent complainant failed to file a complaint in the proper jurisdiction can be a relevant factor when the Board is considering whether it should exercise its discretion. However, this does not mean that filing a complaint in the wrong jurisdiction automatically gives a right to an extension of the *Code*'s time limits.

[27] Third, and this is perhaps the most important factor in this case, the number of days exceeding the 90-day time limit is relatively low. When one compares the 24-day delay (24 days over and above the 90-day limit) in this case with the six-month delay in *Kerr 631*, *supra*, the Board's exercise of its discretion under the *Code* becomes appropriate.

[28] For these reasons, the Board is prepared to determine the complaint filed by Ms. Perron-Martin on its merits. However, the Board will limit its analysis to the events surrounding Ms. Perron-Martin's dismissal on July 17, 2013. The harassment complaints made

in 2011 and 2012 were mentioned earlier merely to provide background in relation to Ms. Perron-Martin's dismissal.

B. Has Mr. Perron-Martin demonstrated that Symcor violated section 147 of the *Code*?

[29] The Board has limited jurisdiction under Part II of the *Code*. The Board does not determine whether an employer dismissed an employee for just and sufficient cause. This, in the case of a non-unionized employee, is the purview of an arbitrator acting in accordance with Part III of the *Code* (sections 240 to 246).

[30] Further, the Board does not sit in appeal of decisions made by employers pursuant to their internal policies respecting harassment and discrimination.

[31] Section 147 sets out the general prohibition relating to disciplinary action taken by an employer:

> 147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee
>
> > (*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
> >
> > (*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer, or
> >
> > (*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

[32] Section 133 applies to complaints arising from disciplinary action taken by an employer:

> 133. (1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.
>
> (2) The complaint shall be made to the Board not later than ninety days after the date on which the complainant knew, or in the Board's opinion ought to have known, of the action or circumstances giving rise to the complaint.
>
> (3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer

has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

(4) Notwithstanding any law or agreement to the contrary, a complaint made under this section may not be referred by an employee to arbitration or adjudication.

(5) On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint and shall, if it decides not to so assist the parties or the complaint is not settled within a period considered by the Board to be reasonable in the circumstances, hear and determine the complaint.

(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

[33] In *Paquet*, 2013 CIRB 691 (*Paquet 691*), the Board described the circumstances under which an employee participates in an occupational health and safety process for purposes of the application of section 147 of the *Code*:

> [54] Essentially, an employer cannot retaliate against an employee **for participating in a Part II process.** This participation could involve giving testimony in a proceeding or providing information related to a Part II matter. Similarly, it could encompass acting in accordance with, or seeking the enforcement of, Part II. For ease of reference, we will refer to these various section 147 participatory actions as a "Part II Process."
>
> (emphasis added)

[34] Also in *Paquet 691*, *supra*, the Board described the analysis to be carried out in a case such as that of Ms. Perron-Martin:

> [59] In summary, the Board is not tasked with the enforcement or interpretation of most of the provisions of Part II. Allegations of non-compliance or contraventions fall to a Health and Safety Officer (HSO), if the parties themselves are unable to resolve them. Similarly, the Board does not resolve collective agreement disputes, even if they relate to Part II health and safety issues. **The *Code* instead mandates the Board to consider if an employer imposed or threatened discipline, including a dismissal, because an employee participated in a Part II Process, as defined earlier.**
>
> [60] This interplay of sections 147 and 133 gives rise to a three-step analysis. Each step must be passed successfully in order for the Board to find a *Code* violation.
>
> 1. Did Air Canada impose, or threaten to impose, discipline?
> 2. Were the employees participating in a Part II Process?
> 3. Did a nexus exist between the Part II Process and Air Canada's discipline?
>
> (emphasis added)

[35] The Board will carry out the same three-step analysis for Ms. Perron-Martin's complaint.

1. Did Symcor impose discipline on Ms. Perron-Martin?

[36] The parties are not disputing that Symcor dismissed Ms. Perron-Martin. There is no debate concerning this first item.

2. Was Ms. Perron-Martin participating in a process under Part II of the *Code*?

[37] The process in question at Symcor was connected with its anti-harassment policy.

[38] In the Board's view, complaints filed pursuant to an internal anti-harassment policy do not generally constitute an occupational health and safety process for purposes of Part II of the *Code*.

[39] Most employers have introduced policies to eliminate harassment and discrimination in the work place. Such policies are put in place by federally regulated employers to promote rights set out in the *Canadian Human Rights Act* (R.S.C. 1985, c. H-6).

[40] To facilitate the introduction of such a policy, the Canadian Human Rights Commission has posted a template for developing an anti-harassment policy on its Website.

[41] In the Board's view, the fact that Ms. Perron-Martin participated in a process pursuant to Symcor's anti-harassment policy does not in and of itself mean that she participated in an occupational health and safety process pursuant to Part II of the *Code*.

[42] There is no reference anywhere in Part II to the concept of harassment. In previous cases, such as *Grolla*, 2011 CIRB 592, the Board had the opportunity to consider Part XX of the *Canada Occupational Health and Safety Regulations* (SOR/86-304) (the *Regulations*), titled "Violence Prevention in the Work Place" (Part XX).

[43] Part XX requires employers to develop a work place violence prevention policy (section 20.3). "Work place violence" is described as follows:

> 20.2. In this Part, "work place violence" constitutes any action, conduct, threat or gesture of a person towards an employee in their work place **that can reasonably be expected to cause harm, injury or illness to that employee.**
>
> (emphasis added)

[44] The Board notes first that the word "harassment" is never used in Part XX. Part XX appears to relate more to circumstances involving violence. This fact alone suggests to the Board that a complaint of harassment filed pursuant to an employer's internal policy is not usually an occupational health and safety process.

[45] It may one day be possible to argue that a harassment complaint is governed at least in part by Part XX, but that is not the case in this matter.

[46] Part XX relates to violence in the work place. There was no intention of expressly covering harassment allegations when it was enacted. The civil courts have long recognized that regulatory impact assessments can be considered in interpreting a regulation (see *R.* v. *Boutcher*, 2001 NFCA 33, paragraph 76).

[47] The second paragraph of the "Regulatory Impact Analysis Statement" included with the *Regulations* when Part XX was enacted contained the following analysis:

> It is recognized that the *Hazard Prevention Program Regulations* for federally regulated companies in Canada has resulted in the development and implementation of specific preventive measures to reduce or eliminate work place hazards, including, in some instances, risks related to work place violence. The *Violence Prevention in the Work Place Regulations* provide a specific instrument to allow for improved prevention programs and enforcement that are specific to work place violence.

[48] A similar interpretation of Part XX was given in a recent decision, in *Canadian Food Inspection Agency* v. *Public Service Alliance of Canada*, 2014 OHSTC 1. In that case, the Tribunal distinguished between certain harassment situations and violence:

> [60] In applying the definition of work place violence provided in the *Regulations* to the facts of this case, I was able to conclude that the employee's allegations of favouritism, humiliating and disrespectful behaviour such as "hand gestures, rolling of your eyes or being verbally demeaning" exhibited to the employee by the supervisor fulfills the first element of the definition set out in section 20.2 as constituting "action," "conduct" and "gesture." However, in my opinion, these allegations are not any that could reasonably be expected to cause harm, injury or illness to the employee.
>
> [61] **Furthermore, I believe that the definition of work place violence is not meant to apply to situations such as the case at hand, where the employee's allegations, if believed to be true, have more to do with feeling humiliated and disrespected by the behavior of the supervisor.** The definition is intended to address situations where an employee is in fear of being harmed, injured or made ill due to the conducts of another individual in the work place.
>
> (emphasis added)

[49] The Tribunal provided further clarification regarding this distinction at paragraphs 65 and 69 of its decision:

> **[65] On the contrary, if the allegations of the employee do not relate to or constitute work place violence, Part XX of the Regulations does not apply. In such a case, the employer can choose to treat the matter through other mechanisms or policies better suited to address the situation. In the present case, the employer chose to apply its *Prevention and Resolution of Harassment in the Workplace Policy* to undertake an initial review of the complaint by the regional director.**
>
> ...
>
> [*69*] I believe that the determination of this matter rests solely on the application of the definition of work place violence set out in section 20.2. The only question I asked myself was whether the alleged conduct, gesture or manner of the supervisor met the definition of work place violence stated in the Regulations. I found that they did not, given that the actions and facts alleged could not reasonably cause harm, injury or illness to the employee. Additionally, I found that nothing precluded the employer from applying its harassment policy to address the allegations of the employee.
>
> (emphasis added)

[50] In the Board's view, Ms. Perron-Martin was involved in harassment complaints filed pursuant to Symcor's anti-harassment policy. Symcor investigated internally in some cases and hired outside specialists to investigate in others.

[51] The onus was on Ms. Perron-Martin to demonstrate that she had participated in a Part II process. She did not meet that onus with her reference to harassment complaints filed under Symcor's anti-harassment policy.

3. Does a nexus exist between a Part II process and Ms. Perron-Martin's dismissal?

[52] Even if the Board were wrong in finding as it did in the second step in the analysis, Ms. Perron-Martin was unable to demonstrate that there was a nexus between her dismissal and an alleged Part II process.

[53] As indicated previously, the Board has no jurisdiction to sit in appeal of decisions arising from complaints of harassment or discrimination. Additionally, Ms. Perron-Martin appears to have already challenged, pursuant to Part III of the *Code*, whether Symcor had just and sufficient cause to dismiss her.

[54] Symcor decided to dismiss Ms. Perron-Martin following investigations carried out in connection with the enforcement of its anti-harassment policy. The dismissal occurred against the backdrop of a series of conflicts between Ms. Perron-Martin and some of her co-workers. The Board is satisfied that the dismissal was the result of those incidents among co-workers rather than any participation in a process under Part II of the *Code*.

[55] The issue of whether or not those incidents provided just and sufficient cause for Symcor to dismiss Ms. Perron-Martin is something that could be argued before an arbitrator.

[56] The Board accordingly dismisses Ms. Perron-Martin's complaint.

Translation

Graham J. Clarke
Vice-Chairperson